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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

HEARING DATE: **2/1/12**
TIME: **10:00 a.m.**

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In re:

JOSEPH F. UVINO AND
WENDY M. UVINO,

Debtors.

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Chapter 11

Case No.: 09-15225-brl

Hon. Burton R. Lifland

DEBTORS' REPLY TO THE LIMITED OBJECTION OF BANK OF AMERICA N.A. TO CONFIRMATION OF THE DEBTORS' SECOND AMENDED PLAN OF REORGANIZATION

TO: **The Honorable Burton R. Lifland**
United States Bankruptcy Judge

Joseph F. Uvino and Wendy M. Uvino, the Debtors and the Debtors-in-Possession (the "Debtors") in the above-referenced chapter 11 case, by their attorneys, the Law Offices of Avrum J. Rosen, PLLC, as and for their Reply to the Limited Objection of Bank of America, N.A. (ñBOAò), to Confirmation of the Debtorôs Second Amended Plan of Reorganization, respectfully represents to this Court as follows:

1. BOA raises several limited objections to the confirmation of Debtorsô Plan. Before discussing those objections, it must be noted as to those items that BOA does not dispute. BOA does not dispute that it is an over secured creditor on the East Hampton property. BOA does not dispute that other than those items that it has raised in the limited objection, that the plan is feasible, and meets all the other requirements under § 1129 of the bankruptcy code.

2. As a result, the issues before the Court, are that BOA is not unimpaired under 11 USC § 1124 (1). BOA is incorrect for several reasons. First, § 1124 (1), speaks to the unaltered legal equitable and contractural rights to which such claim or interest entitles to such holder of

such claim or interest (emphasis supply). The fundamental mistake made by BOA is that it fails to perceive the difference between the treatment on its secured claim, and any unsecured claim that it may have.

3. BOA's position is that because the Plan only leaves it with its State Court remedies against the property, and not the Debtors on any deficiency claim, that it is impaired. However, any unsecured deficiency claim that it might have (and such claim is non-existent given the value of the property) is not part of its secured claim. BOA's secured claim, relates to the property. As a result, all of its State Court rights relating to the property are preserved. None of the cases cited by BOA stand for a different proposition.

4. Indeed, one of the main cases relied upon by BOA is *In re PPI Enterprises, Inc.,* 324 F.3d 197 (3d Cir. 2003), actually provides an additional reason why the secured claim of BOA is not impaired.

5. In *PPI Enterprises*, the Third Circuit held that impairment of a creditor's state law contractural or other statutory rights, by virtue of other provisions of the Bankruptcy Code, did not constitute impairment under § 1124 (1). In that case, a landlord was being paid in full on his lease rejection claim as limited by 11 USC § 502 (b) (6). The landlord argued that he was impaired, because he was not being paid his full state law claim and that his vote against the plan should have been allowed by the Bankruptcy Court. The Circuit Court disagreed and made clear that when rights are limited by other provisions of the Bankruptcy Code, that is not impairment under § 1124. The impairment under § 1124 has to result from an impairment that arises under the terms of the plan.

6. BOA's entire argument is based upon the fact that the plan leaves its rights to proceed against the property in State Court in place, but not to permit any deficiency judgment

against the Debtors. This bar against proceeding against the Debtors does not arise from the terms of the plan. It arises from § 1141 (d) (1) (A) & (5) which grant a discharge upon confirmation and compliance with a Plan of Reorganization. As a result, the case cited by BOA to support its position, actually is directly on point in supporting the Debtorsô position that the secured claim of BOA is not impaired.

7. The next argument raised by BOA, borders on being frivolous. BOA takes the position that because the plan retains jurisdiction in this Court to object to the proof of claim filed by BOA, that its state law rights have been impaired. Of course, as a secured creditor, BOA was under absolutely no obligation to file a proof of claim in this case pursuant to 11 USC § 506 (d) (2). Nonetheless, having consented to the jurisdiction of this Court, BOA now wants to claim that it is impaired, because the Debtors wish to utilize the forum which BOA chose, to determine the propriety of the large attorneyôs fee claim generated by BOAôs counsel in this case, and other aspects of BOAôs claim. This objection must be overruled.

8. BOAôs next argument is that if it is impaired, then the plan cannot be confirmed because the Debtors cannot meet the fair and equitable standard under 11 USC § 1129 in that BOA is not being given the indubitable equivalent of its claim. Again, BOAôs argument is the same, since it is being denied its right for a deficiency judgment, it is not the indubitable equivalent. Of course, the indubitable equivalent standard arises when a secured lender is forcibly having collateral substituted by a debtor. An instructive case in this regard is *In re Michael George May* 174 B.R. 832 BCK (Sd. G.A. 1994), that case, in reviewing a survey of the decisions on this issue the Court stated that:

> These decisions made clear that a debtor my substantively alter the rights that a secured creditor otherwise enjoys in its collateral under state law, as long as that creditor receives the ñindubitable equivalentò of its secured claim.ò ñThe principle that leaves parts of the bankruptcy

> unaffected cannot be take literally..,é and it is the law that, provided the plan of reorganization and gives the secured creditor the ñindubitable equivalentò of its secured interest, the bankruptcy judge cannot force the creditor to accept the exchange. (citations omitted.)

9. As this case makes clear, the inquiry, is again to the rights that a *secured creditor* holds in the collateral, not any other rights that it might have through a deficiency judgment. BOAôs rights to its collateral are not being affected.

10 This rationale coincides with the other requirement that a creditor not receive less than it would receive in Chapter 7 liquidation. In such liquidation, BOA, would, have the right to seek relief from the automatic stay and to proceed on its State Court rights. Assuming there was no successful objection to the Debtorsô discharge, and there has been no hint of such in this case, BOA would have the exact same rights given to it under the Plan. It would have the right to foreclose its State Court rights, and it would have no right to a deficiency judgment against the Debtors, as they would have their discharge. If the trustee abandoned the property, the Debtors would be free to defend the foreclosure. If the trustee did not abandon the property, he or she would be free to defend the foreclosure. It is respectfully submitted that BOA, if it were impaired, which it is not, would obtain the indubitable equivalent of its claim pursuant to the plan.

11. Lastly, it must be noted that BOA misconstrues its options under the Plan. The treatment on the vote that BOA takes under its secured claim, is separate and apart from its treatment given under the general unsecured claim. It is the Debtorsô understanding that BOA would be free to either vote for or against the plan on its own secured claim, without having any affect on its vote under the secured claim. If it were to vote for the plan under the secured claim, it would affect the distribution and its general unsecured claim. The opposite is not the case.

12. The Debtorsô point this out, because BOA is clearly trying to sabotage the

Debtorsô plan by voting NO on its own unsecured claims (a ploy that would not work, because sufficient ballots have already come in supporting the Plan for that class to have accepted it) even though that class is being paid 100 cents on the dollar.

WHEREFORE, it is respectfully submitted that the Plan be confirmed and the limited objection overruled, together with such other and further relief as to this Court seems just and proper.

Dated: Huntington, New York
January 18, 2012

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